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Case Comments

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ATTORNEY AND CLIENT—ATTORNEY IS AN OFFICER OF THE COURT, AND, WHERE THE RECORD ON WHICH HE RELIES HAS BEEN CHANGED, HE OWES THE COURT A DUTY TO USE DILIGENCE TO SEE THAT IT IS TRUE AND CORRECT. —Respondent was before the court to show why he should not be punished for contempt for making certain changes in a transcript filed in the instant court. Held, rule discharged; that the evidence was insufficient to show that the changes were made by or at the instance of respondent; however, that the interlineations in the transcript were so awkwardly made that the respondent owed the court a duty to see that they were correct and made by the officers of the court. He, having failed to so act, constrains the court to reprimand. *Sparks* v. *Commonwealth*, 224 Ky. 221, 8 (2d) S. W. 397.

The instant holding is in accord with *Rice v. Commonwealth*, 57 Ky. (B. Mon.) 472, an early case on the point, which held, that the alteration by an attorney of a letter that was to be used in a court as evidence, was sufficient ground to disbar him from practice. Again, in *Baker* v. *Commonwealth*, 73 Ky. (10 Bush) 592, the rule was invoked. There is an unbroken line of decisions in the Kentucky Reports in accord with the instant holding.

The rule finds support in many other jurisdictions. In *In Re Bergerson*, 220 Mass. 472, 107 N. E. 1007, Ann. Cas. 1917 A., it was held: "An attorney is an officer of the state binding him to the highest fidelity to the court, and sustaining obligations to the public no less significant than those to his clients."

An attorney is an officer of the state owing duties to his clients and the court. To discharge these duties properly requires the exercise of keen discrimination, and, when the interest of his client, and the interest of the public conflict, as an officer of the court, he must yield to the latter. He therefore occupies what may be called a quasi-judicial office. *Langen* v. *Barkawski*, 188 Wis. 277, 206 N. W. 181; *In Re Maresk's Will*, 177 Wis. 194, 187 N. W. 1009. An Oregon statute makes an attorney an officer of the court. *In Re Crum*, 103 Or. 296, 204 Pac. 948.

An attorney, who, while transporting a memorandum from one court to another, altered it, for the purpose of deceiving the latter court, was disbarred. *Matter of Lundy*, 14 Ch. Cir. Ct. 561, 8 Oh. Cir. Dec. 111. In *Matter of Houghton*, 67 Cal. 511, 8 P. 52, a case on all fours with the instant case, it was held, as did the Kentucky court, that where it is not clear that the attorney did intend to state a falsehood, and thereby deceive the court, there is no ground for disbarment.

Attorneys are officers of the court. Their high vocations are to correctly inform the court upon the law and the facts before it, and to aid it in doing justice and arriving at just conclusions. They violate their oaths of office when they resort to deception or allow their clients to so

do. *Cleo* v. *Beattie*, 137 Ill. 553, 27 N. E. 1096; *People* v. *Barrios*, 237 Ill. 527, 86 N. E. 1075.

Thaicker v. *United States*, 212 F. 801, 129 C. C. A. 255; *Gelders* v. *Haywood*, 182 F. 109; and *Exparte Cole*, 6 F. Cas. 2973, 1 McCray 405, are adequate to show the United States federal courts to be in accord with the Kentucky decisions. However, disbarment in a federal court does not restrain practice in state courts.

It is submitted that the holding in the present case is sound on principle, supported by unanimous authority, and is very desirable in results. C. M. S.

BILLS AND NOTES—DEBT IS PRESUMED CREATED SIMULTANEOUSLY WITH THE EXECUTION OF NOTE THEREFOR, WHERE REPLY CONTROVERTED CLAIMS OF PRIOR EXISTING INDEBTEDNESS, AND NO PROOF TAKEN.—Prior to making the note in question the maker, defendant, was indebted to plaintiff. By many summary conveyances he deeded away his land to third persons, some before and some after the execution of the note to plaintiff; the facts do not disclose the nature of the debt, nor the conditions under which the note was executed. However, the contention was made that not only were the conveyances subsequent to the execution void, because with intent to defraud creditors, but also those prior thereto for the same reason. Held: Where there is only an allegation that a note was given for a prior existing debt, but no proof taken, the presumption is that the debt was created simultaneously with the execution of the note, and therefore only those conveyances after the execution are void. *Cornett* v. *Brashear*, 225 Ky. 526, 9 (2d) S. W. 302.

The subject of the main suit involved only the liability on the note. However, a subsidiary question was whether or not the plaintiff could have levied on the property conveyed prior to the execution of the note. There is no question but that the subsequent conveyances can be avoided. The effect of plaintiff's contention places him in the awkward position of asserting that the note was not given for value, and at the same time asking judgment on it. This must be the effect of the contention since if the note was given in place of the old debt, so that the new promise would support the present suit all rights must have been merged in the note. The theory upon this point is that the promise to release all claims under the old debt is the consideration for the new, and the creditor thereby becomes a purchaser for value. *Platt* v. *Beebe*, 57 N. Y. 339; *Manning* v. *McClure*, 36 Ill. 490; *Willey* v. *Cobb*, 165 Mass. 503, 43 N. E. 497; *Brown* v. *North*, 21 Mo. 528; *Lumberg* v. *N. W. Elevator Co.*, 42 Minn. 37, 43 N. W. 685; *McCabe* v. *Conner*, 68 Mich. 182, 35 N. W. 901. Upon these authorities it would seem to follow that the plaintiff could not claim anything on the prior debt, while at the same time suing on the new promise. On the other hand if the note was merely security, or a conditional payment, he could not sue on the note because he would not have been a bona fide holder, no consideration having been given.

The Kentucky rule upon this point was decided in the early case *Gilmore* v. *Green*, 77 Ky. 772. The court there held that a new promise to pay a pre-existing debt would not support an action, but that where it was shown to have been the intention of the parties for the new promise to take the place of the old, such suit could be maintained. This rule was again applied in *Groves* v. *McGuise*, 79 Ky. 536. The case at bar combines the rule that bills and notes will be presumed to have been given for value and thereby concludes that a note given for a prior debt, unless proven otherwise, will be presumed created at the time of the execution of the new note.

Upon this proposition the Supreme Court of the United States seems to be much more liberal. Judge Story in the case of *Swift* v. *Tyson*, 16 Peters, 19, 10 L. Ed. 872, declared such payment of a note or other security to be a valuable consideration, a benefit to both parties and to the commercial world, as probably more than one-half of all bank transactions were of this character, and that a contrary doctrine would strike a fatal blow to all discounts of negotiable securities for pre-existing debts. This view was affirmed in *Prentice* v. *Zane*, 8 Howard 468, 12 L. Ed. 1160. W. H. C.

CONSTITUTIONAL LAW—STATE STATUTE TAXING RECORDING OF MORTGAGES RUNNING LESS THAN FIVE YEARS HELD VIOLATIVE OF EQUAL PROTECTION CLAUSE AS ARBITRARY CLASSIFICATION.—This case arose under the Kentucky Statute of 1922, Article 496, Section 4019a-9, which places a tax of twenty cents upon each one hundred dollars of indebtedness secured by mortgage, provided such mortgage does not mature within five years and is placed on record. The plaintiff was a large corporation which recorded a mortgage of eighteen million dollars. The tax was paid under protest. The court in reversing a decision of the Kentucky Court of Appeals held the tax invalid as an infringement on the equal protection clause of the United States Constitution. *Louisville Gas & Electric Co.* v. *Coleman, State Auditor*, 48 Sup. Ct. 423.

This case was decided by a five to four vote. The point raised was simply how far a legislature may go in making classifications before they will be considered unjust and arbitrary, and deny the one discriminated against the equal protection of the laws. A statute which treated owners of real estate under which were minerals materially different from one who had no minerals under his land was held to be unconstitutional under the equal protection clause. *State* v. *Donald*, 161 Wis. 188, 153 N. W. 238. The classification must not be arbitrary or whimsical but must be founded upon real differences of situation and condition affording rational grounds for the difference in treatment. *Northwestern Mutual Life Insurance Co.* v. *State*, 163 Wis. 484, 155 N. W. 609. A tax on stockholders in a railroad specially chartered was held invalid. *Detroit, G. H. & M. Ry. Co.* v. *Fuller*, 205 Federal 86. A statute which imposed a poll tax on alien inhabitants alone was held to

be in violation of the due process clause. *Ex Parte Kotta*, 187 Calif. 27, 200 Pac. 957. A statute which provided for special tax on corporations with no par value stock but taxed other corporations on their capital stock and surplus was held unconstitutional. *Southwestern Bell Telephone Co.* v. *Middlekamp*, 1 Federal, (2nd) 563. A statute provided that a certain sum should be paid to the clerk of the probate court for placing an estate upon the docket proportionate to the amount of the estate. The court held the tax unconstitutional, on the ground that it paid different amounts for the same work. *Cook Co.* v. *Fairbanks*, 222 Ill. 578, 78 N. E. 895.

There are cases contra to this in both the United States Supreme Court reports and in those of the state courts but there are few where the discrimination is as pronounced and arbitrary as it appears in the instant case. Telephone companies with an earning of five hundred dollars were subject to an ad valorem tax while those who earned less were exempt under a statute which was upheld. *Citizens Telephone Co.* v. *Fuller*, 229 U. S. 322. A statute was upheld which imposed a license charge of one thousand dollars on theaters where the admission was one dollar or more but only four hundred dollars on one which charged less than one dollar. *Metropolis Theater Co.* v. *Chicago*, 228 U. S. 61. An act which imposed a tax of two per cent on the premiums paid to sick and funeral insurance companies was held not to be unjust nor an arbitrary discrimination. *Peninsular Industrial Ins. C.* v. *State*, 61 Fla. 376, 55 So. 398.

After carefully reviewing the authorities it appears that the case in question is supported by the majority of the courts and it is likewise supported by good reason. G. C. R.

COUNTIES—COUNTIES MAY RECOVER ILLEGALLY PAID CLAIMS, THOUGH ALLOWED BY THE FISCAL COURT AND PAID BY TREASURER.—Appellee, a county treasurer, had disobeyed the fiscal court's orders by paying illegal claims on debts which the county had incurred at a prior date. In reversing a judgment in favor of the appellee the court held, that even though the fiscal court had allowed an illegal claim and the county treasurer had paid it, the county can recover from the one wrongfully receiving the money. *Pulaski County et al.* v. *Richardson, County Treasurer et al.*, 225 Ky. 556, 9 (2d) S. W. 556.

The decision of the Court of Appeals in allowing a recovery on an illegally paid claim upholds a long line of prior decisions of the same nature. *Mills* v. *Lantrip*, 170 Ky. 81, 85 S. W. 514; *Commonwealth* v. *Richmond*, 148 Ky. 849, 147 S. W. 913; *Elliot et al.* v. *Commonwealth*, 144 Ky. 335, 138 S. W. 300; *Hopkins* v. *Givens*, 29 Ky. Law Rep. 993, 96 S. W. 819.

Where the fiscal court refuses to take action to recover sums illegally paid by it, a citizen and taxpayer of the county may maintain a suit in the name of the county to recover the amount. *Mills* v. *Lantrip*, 170 Ky. 81, 85 S. W. 514. Also, a county may maintain an action

to recover against a member of the fiscal court who has purchased a claim against the county where a statute prohibits the purchase of a claim against the county by a member of the court. *Logan County* v. *Head*, 206 Ky. 97, 266 S. W. 883. A taxpayer may recover against the sheriff funds paid to him illegally by the fiscal court. *Shipp* v. *Rodes*, 196 Ky. 523, 245 S. W. 197.

Where the county commissioners have misconstrued a statute and allowed a clerk traveling expenses when they were not due him, the adjudication is not conclusive on the county. *Norfolk County* v. *Cook*, 211 Mass. 390, 97 N. E. 778. Nor has a board of supervisors the power to audit and allow an account not legally chargeable to the county. *Richmond County* v. *Ellis*, 59 N. Y. 620.

Money paid voluntarily, however, by the fiscal court in the absence of fraud, illegality, or mistake can not be recovered back, although the county at the time the claim was allowed, may have had proper grounds for refusing payment. *Commonwealth* v. *Scarborough*, 148 Ky. 561, 147 S. W. 31.

There is no question but that the holding of the court in the present case is in line with the adjudications in the other jurisdictions and conforms to a long line of decisions of its own. Sustained by so much authority and for the protection it affords the taxpayer, the decision is unquestionably correct. H. C. C.

CRIMINAL LAW—PERSON IS AN "ACCOMPLICE" IF SO PARTICIPATING OR AIDING IN OFFENSE AS TO AUTHORIZE HIS CONVICTION AS PRINCIPAL OR AIDER.—Defendant F was convicted with H of the offense of unlawfully transporting intoxicating liquors. F's automobile was used in the commission of the offense. D, an accomplice, testified as to this and his testimony was corroborated by H. The court instructed the jury that this evidence by D would be insufficient unless corroborated by other evidence, and that the corroboration is insufficient if it merely shows that the offense was committed and the circumstances thereof. D asked for an instruction for acquittal because of the insufficiency of the evidence to make him an "accomplice." Held: F was an accomplice. *Fryman* v. *Commonwealth*, 225 Ky. 808, 10 (2nd) S. W. 302.

Everyone is a party to an offense who either actually commits the offense or does some act which forms a part thereof, or assists in the actual commission thereof, or directly or indirectly counsels or procures any person to commit the offense or any act forming a part of the offense. *State* v. *Scott*, 80 Conn. 317, 68 A. 258. In felonies the participants are divided into two general classes: (1) principals in first degree, and (2) principals in second degree. *United States* v. *Martin*, 176 F. 110; *Wiliams* v. *State*, 41 Ark. 173; *Rex* v. *Royce*, 4 Burr. 2073, 98 Reprint 81. A Principal in the second degree, or "accomplice," is one who is present actually or constructively, aiding and abetting in the commission of the felony. *Jolly* v. *State*, 94 Ala. 19, 10 So. 606; *Able* v. *Commonwealth*, 5 Bush (Ky.) 698; *Pierce* v. *State*, 130 Tenn.

24, 168 S. W. 851; *State* v. *Boysen*, 30 Wash. 338, 70 P. 740. At common law the accomplice must have been present, actually or constructively at the time and place of the commission of the crime. Also at common law an "accomplice" included all *particeps criminis*, whether they were principals in first or second degree, or mere accessories before or after the fact. *People* v. *Coffey*, 161 Cal. 433, 39 L. R. A. (N. S.) 704.

The test applied by the court in the instant case is the universally accepted one. An accomplice is one who in some degree is involved in the offense charged, and who may be indicted for the same offense for which the principal is tried. *Raum* v. *Board of Council of City of Danville*, 155 Ky. 690, 160 S. W. 255; *Brinegar* v. *State*, 82 Neb. 588, 118 N. W. 475; *Maggard* v. *State*, 90 Okl. Cr. 265, 131 P. 549; *State* v. *Weston*, 109 Ore. 19, 219 P. 180; *United States* v. *Neverson*, 1 Mackey, 152; *United States* v. *Henry*, 4 Wash. C. C. 428, Federal Case No. 15351.

The mere presence of one when a crime is committed does not make him an "accomplice," but to do so he must have knowingly, voluntarily, and with common interest united with the principal in the commission of the crime. *Hicks* v. *State*, 126 Tenn. 359, 149 S. W. 1055; *Maggard* v. *State*, *supra*; *Howard* v. *State*, 90 Tex. Cr. R. 270, 233 S. W. 847. An intent to commit an offense or to aid in the commission thereof is essential to render one an "accomplice." *State* v. *Yates*, 181 Ia. 539, 164 N. W. 798; *Hicks* v. *State*, *supra*; *Howard* v. *State*, *supra*.

There is a conflict of authority as to the question whether there is a distinction between an "accomplice" as a witness and as a defendant. *State* v. *Case*, 61 Ore., 265, 122 P. 304, and *State* v. *Weston*, 109 Ore. 16, 219 P. 180, hold there is no distinction between the two. Some courts place a broader significance on the former than on the latter. An "accomplice" in relation to his use as a witness means any criminal connection of the witness with the matter in trial, either as a principal, accomplice, accessory, or receiver of stolen property. An accomplice in the crime means one who either as a principal, accomplice, or accessory is connected with the crime by an unlawful act or omission on his part, transpiring either before, at the time of, or after the commission of the offense, and whether or not he was present and participated in the offense. *Goldstein* v. *State*, 73 Tex. Cr. R. 622, 166 S. W. 149. Whether or not a witness is an accomplice of the accused is for the determination of the jury on conflicting evidence, but for the court where his acts and conduct are admitted. *People* v. *Coffey*, *supra*; *Re Rowe*, 77 F. 161. W. C. W.

DURESS—THREAT OF SUIT, UNLESS BANK CASHIER EXECUTED DEEDS TO GUARANTEE PAYMENT OF CERTAIN NOTES DISCOUNTED, WAS INSUFFICIENT TO RELIEVE HIM, WHERE HE EXECUTED DEEDS.—Appellant, as cashier of a bank, discounted certain notes which the bank examiner held bad. Appellee, with other directors of the bank, contended that appellant was liable to the bank for discounting notes without good and sufficient surety. Both sides employed counsel and a compromise

was effected whereby appellant executed deeds to the directors to secure the notes in dispute. Appellant was to have use of the agencies of the bank for collection, was to have credit for all payments on same and at the end of a stipulated period an assignment of notes remaining unpaid. In an action to secure the cancellation of his deeds to the directors on the ground of duress the court held that there was no duress; that there was good consideration for the execution of the deeds and that the appellees be adjudged to have a lien on appellant's land for the payment of such notes. *Northcutt et ux.* v. *Highfill et al.*, 225 Ky. 456, 9 (2nd) S. W. 209.

It is a well established rule that it is not duress to institute or threaten to institute civil suits, or take proceedings in court, or for any person to declare that he intends to use the courts wherein to insist upon what he believes to be his legal rights. *U. S. Banking Co.* v. *Veale*, 84 Kan. 385, 114 Pac. 229, 37 L. R. A. (N. S.) 540; *Hilborn* v. *Bucknam*, 78 Me. 482, 7 Atl. 272; *Benson* v. *Monroe*, 7 Cush. (Mass.) 125, 54 Am. Dec. 716, 9 R. C. L., Sect. II, 722.

As early as 1808, the Kentucky court in the case of *Edwards* v. *Handley*, 3 Hardin (Ky.) 615, laid down a rule to this effect; "Menace of corporal pain shall avoid a deed; but menace of his goods shall not." And in *Hazelrigg* v. *Donaldson*, 2 Metc. (Ky.) 445, "Duress that will avoid a deed is that which compels the grantor through personal restraint or fear of personal injury or imprisonment, to do what he would not do voluntarily," and again in the case of *Harris, Speakes & Harris* v. *Kriegle*, 197 Ky. 50, 245 S. W. 866, "Duress which will relieve one from an obligation arises from a threat of personal injury putting one in fear, and not from a threat of litigation."

The following statement is representative of the undisputed rule in this country: "To constitute 'undue influence' so as to render a deed invalid, the mind of the grantor must be so controlled or affected by persuasion or pressure, artful or fraudulent contrivances, or by insiduous influences of persons in close confidential relations with grantor so that he is not left to act intelligently, understandingly, and voluntarily, but subject to the will or purpose of another." *Peacock* v. *DuBois*, 90 Florida 162, 105 So. 321. And the mere fact that plaintiff entered into a compromise reluctantly or in order to avoid the trouble or expense of a lawsuit, does not amount to intimidation or duress. *Andrews* v. *Connelly*, 145 Fed. 43; *Satchfield* v. *Laconia Levee Dist.*, 74 Ark. 270, 85 S. W. 409; *Kiler* v. *Wohletz*, 79 Kan. 716, 101 Pac. 474, L. R. A. 1915B 11; *Layer* v. *Layer*, 184 Mich 663, 151 N. W. 759; *Dunham* v. *Griswold*, 100 N. Y. 224, 3 N. E. 76. The perfectly obvious reason for the rule is that it can never constitute duress merely to threaten to do what a party has a legal right to do.

It has also been held that where the grantee did not instigate or have knowledge of the duress, a deed may not be avoided for duress by others. *Wells Fargo Nevada Nat'l Bank of San Francisco* v. *Barnette*, 298 Fed. 689.

To establish duress the evidence must show facts reasonably adequate to overcome the will of the party making the compromise. *Andrews* v. *Connelly, supra; Kiler* v. *Wohletz, supra; Galusha* v. *Sherman,* 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417.

It is brought out, in the case at bar, that there was a dispute as to appellant's liability to the bank on the notes in question; that both sides employed counsel and a compromise was effected which resulted in the execution of the deeds which appellant is seeking to cancel. In view of this statement of the case, and applying the unquestioned doctrines of the law of duress, there is not the slightest grounds for a disposition of this point in the case other than that adopted by the court.

C. E. B.

HOMICIDE—FAILURE TO INSTRUCT THAT THE TIME BETWEEN PREVIOUS DIFFICULTY AND SHOOTING WAS INADEQUATE "COOLING TIME" HELD NOT PREJUDICIAL WHERE DEFENDANT WAS CONVICTED OF MANSLAUGHTER.—Appellant had been struck by the deceased with an ax handle. He left the place of difficulty and obtained a shot gun, returned to the scene and immediately shot and killed his adversary. Appellant was indicted for murder, but at the trial was convicted of manslaughter. On appeal it was contended that it was prejudicial error for the trial court not to instruct that the time between the altercation and shooting was inadequate "cooling time." Held, that as appellant was convicted of manslaughter and not murder, the failure to so instruct was not prejudicial. *Highbarger* v. *Commonwealth,* 225 Ky. 302, 10 (2nd) S. W. 286.

Under section 263 of the Civil Code of Kentucky, where the indictment is for murder, the accused may be convicted of any degree of homicide as fixed by common law, viz.: murder, voluntary manslaughter, or involuntary manslaughter. *Buckner* v. *Commonwealth,* 14 Bush 601, 77 Ky. 601; *Horseman* v. *Commonwealth,* 128 Ky. 818, 110 S. W. 236. An offense which would otherwise be murder becomes voluntary manslaughter where the jury find that the killing was not done with malice aforethought. *Zeltner* v. *State,* 32 Ohio Cir. Ct. P. 102; *Commonwealth* v. *Paese,* 220 Pa. 371, 69 Atl. 891, 123 Am. St. Rep. 699.

Where a court is requested to instruct that the accused did the act in the heat of passion or before he had time to "cool" off, it is in effect requesting a verdict for manslaughter. *Hocker* v. *Commonwealth,* 33 Ky. Law Rep. 944, 111 S. W. 676; *Marshbanks* v. *State,* 80 Tex. Cr. Rep. 507, 192 S. W. 246; *State* v. *Rennison,* 306 Mo. 473, 267 S. W. 850.

It is reversible error not to instruct as to a lesser degree of offense of which there is some evidence, such as to create a reasonable doubt. *Breeden* v. *Commonwealth,* 151 Ky. 217, 151 S. W. 407; *State* v. *Trusty,* 118 Iowa 498, 92 N. W. 677. However, it is not reversible error where the trial court refused or failed to give an instruction, when the verdict shows that the defendant was not prejudiced thereby. *State* v. *Beel,* 170 N. C. 764, 87 S. E. 416; *People* v. *Frindel,* 58 Hun. 482, 12 N. Y. S. 498.

Clearly the court's ruling that the verdict cured the trial court's error in failing to instruct as requested is in keeping with good sense and the better law. While it is true that the trial court erred, yet it is a needless expense for the Commonwealth to go into another trial when defendant's case could not possibly have been prejudiced thereby.

H. C. C.

INFANTS—MINOR, WHOSE FATHER SUED IN HIS BEHALF AS NEXT FRIEND, HELD ENTITLED TO DAMAGES FOR IMPAIRED EARNING CAPACITY BEFORE ATTAINING MAJORITY.—C, a minor, was injured because of the negligence of the defendant city in the upkeep of a bridge. The injury became infected, and C became permanently disabled. C sues through his father as next friend, and the father later filed a petition to be made a party plaintiff. Defendant contended that C was entitled to recover for the impairment of earning capacity after he reached majority, and that the father was entitled to loss of services as well as for impairment of earning capacity before majority. Held: C was entitled to the loss of services and the impairment of earning capacity both after and before reaching majority. *City of Pineville* v. *Lawson*, 225 Ky. 542, 9 (2nd) S. W. 517.

The general rule is that a minor owing services to his parents cannot recover damages for loss of services or diminshed earning capacity, during minority, resulting from a personal injury, since those items of damage ordinarily belong to the parent and not to the minor. *Farrar* v. *Wheeler*, (1906) 145 F. 482. *Peppercorn* v. *Black River Falls*, 89 Wis. 38, 61 N. W. 79; *Nemorafskie* v. *Interurban Street R. Co.*, 87 N. Y. Supp. 463. But when a child is injured permanently, as in the instant case, two rights of action accrue, one in the father for the loss of services until the child reaches majority, and the other in the child for his pain and suffering and the impairment of earning capacity after majority. *Louisville, H. & St. Louis Ry. Co.* v. *Lyons*, 156 Ky. 222, 160 S. W. 942. A minor cannot recover for loss of time, loss of wages, or decreased earning capacity during minority. *Chicago, S. B. & N. Q. Ry Co.* v. *Seaman*, 182 Ind. 370, 105 N. E. 234. A child may recover for pain and suffering during minority. *Murphy* v. *Ludowice Gas & Oil Co.*, 96 Kan. 321, 150 P. 581; *C. N. O. & T. P. R. Co.* v *Troxell*, 143 Ky. 765, 137 S. W. 543.

There are exceptions to the general rule, one of which is the basis for the decision in the instant case: (1) If the minor can show that his earnings belong to himself and not to his father then he can recover for loss of services, wages, and diminished earning capacity. The minor does this by showing that he is emancipated. *Atlanta & W. P. R. Co.* v. *Smith*, 94 Ga. 107, 208 S. E. 763; *Chicago, S. B. & N. I. Ry. Co.* v. *Seaman, supra; Douleut & Williams* v. *Hoffman*, (1920) 204 Ala. 33, 86 So. 73. (2) Where the father waives his right to sue after suit is brought in behalf of the infant. A waiver of the father's right of action is shown where the suit is brought in the name of the minor by the father as guardian or next friend for entire damages, which include

loss of services, loss of wages, pain and suffering, and impairment of earning capacity both before and after maturity. *Zongker* v. *People's Union Mercantile Co.*, 110 Mo. App. 382, 86 S. W. 486; *Daly* v. *Everett Pulp and Paper Co.* 31 Wash. 252, 71 P. 1014; *Baker* v. *Flint and P. M. R. Co.*, 9 Mich. 298, 51 N. W. 897; *C. N. O. and T. P. R. Co.* v. *Troxell, supra; C. & O. R. Co.* v. *Davis*, 22 Ky. L. Rep. 1153, 58 S. W. 698. This exception to the general rule is the basis for the decision in the principal case. In the instant case the father waived his right of action by joining in the action in behalf of the infant. It must be clearly shown that the father intended to relinquish his cause of action. *Slaughter* v. *Nashville, Chattanooga & St. Louis Ry. Co.*, 28 Ky. L. Rep. 665. The waiver may be made before as well as after the commencement of infant's right of action. *Judd* v. *Ballard*, 66 Vt. 668, 30 A. 96.

W. C. W.

INSURANCE—PREMIUM PAYMENT, TENDERED AFTER DUE RECEIVED AND RETAINED BY INSURER ON CONDITION, HELD BINDING ON INSURER, WHERE CONDITION WAS NOT COMMUNICATED TO OR ASSENTED TO BY INSURED.—Appellee was beneficiary of a life policy issued by appellant, then due, if valid. The policy contained a clause incurring a forfeiture in the event the premium was not paid on November 21, or thirty days thereafter. Appellee averred and proved that the insured tendered the premium on December 30, and that appellant accepted and retained the payment, communicating no condition of acceptance, and that the insured never assented to any condition of acceptance. Held, that acceptance and retention of the premium by appellant, without communicating to insured any condition of acceptance, though the policy had lapsed because of failure of insured to remit the premium within the limited time, would bind it on the policy. *Equity Life Insurance Co. of United States* v. *Brewer*, 225 Ky. 472, 9 S. W. (2d) 206.

The present holding is in accord with the adjudications of former Kentucky courts upon the question raised. In *Citizens' National Insurance Co.* v. *Egner*, 167 Ky. 478, 180 S. W. 778, a case involving a policy and facts similar to those before the instant court, it was held, that since the insurer had accepted and retained the premium upon a policy, lapsed because of failure to pay premium, without bringing home to insured any condition of acceptance, the policy was reinstated *ipso facto*, and the insurer could not avoid liability. However, it is just as well established in this state that a conditional acceptance of a premium upon a lapsed policy may be binding on the insured, if the condition on which the premium is accepted is communicated by the insurer. This burden is wholly upon the insurer. And nothing less than actual notice will suffice. *Fidelity Mutual Life Insurance Co.* v. *Price*, 117 Ky. 25, 77 S. W. 384.

Kentucky is in accord with the general rule and weight of authority in the United States. The New York Appellate Court in *Gould* v. *Equitable Life Assurance Association of the United States*, 231 N. Y. 208, 131 N. E. 289, in reversing a lower court on the point,

said: "Had there been no notice to the insured of a conditional acceptance the holding would have been sound." Other decisions expressing the same view are: *Hodsdon* v. *Guardian Life Insurance Co.*, 97 Mass. 114, 93 Am. Dec. 73; *Insurance Co.* v. *Walff*, 95 U. S. 326; *Phoenix Life Insurance Co.* v. *Raddin*, 120 U. S. 183, 30 L. Ed. 644.

Missouri goes further than Kentucky and the general rule. It was held in *Andros* v. *Insurance Co.*, 168 Mo. 151, 67 S. W. 582, that even though communication of a conditional acceptance was made by the insurer to the insured, the acceptance and retention of payment would operate to renew the policy. *Reid* v. *Banker's Union*, 121 Mo. App. 419, 99 S. W. 55, expressed a like opinion.

The instant holding is in accord with prior decisions in Kentucky, the weight of authority, and the trend of development in insurance law, all of which have evolved out of a necessary respect and distinction brought about by the growing needs for insurance facilities. Insurers and insured are equally protected and benefited thereby. C. S. M.

MINES AND MINERALS—WHERE LESSEE PAID STIPULATED OIL ROYALTIES, IT HAD RIGHT TO USE CASING HEAD GAS ON OR OFF THE PREMISES.—Defendant was the lessee under an oil and gas lease, by the terms of which the plaintiff, as lessor, granted and demised to him all of the oil and gas under the described land, with the right to use said oil and gas. It was further agreed that in case oil should be found in paying quantities, lessee was to pay a one-eighth royalty to the lessor, and a stipulated rental was also to be paid upon any gas well which should produce gas in paying quantities. Three oil wells were drilled, and oil was produced in sufficient quantities to market. The defendant piped the casing head gas from one of these wells off of the premises and used it for pumping wells on other leases. All oil royalties were promptly paid, and no gas was produced in paying quantities. Plaintiff brings this action for the value of the casing head gas used off the premises. Held, that such gas was the property of the lessee, since he had complied with all of the express terms of the lease. *Midsouth Oil Co.* v. *Cochran*, 225 Ky. 676, 9 (2d) S. W. 1004.

This decision is illustrative of the confusion which characterizes the decisions of practically all the courts on the subject of the status of casing head gas. There have not been a great many decisions by appellate courts in which the question has been considered, and it can be clearly said that the law is vague and indefinite.

By what appears to be the majority rule, in the absence of express stipulation, casing head gas is classified as "oil." *Wemple* v. *Producers' Oil Co.*, 145 La. 1031, 83 So. 232. This rule is followed by Texas and the Federal courts, and seems to be the most logical. *Livingston Oil Corp.* v. *Waggoner* (Texas Civ. Appeals) 273 S. W. 903; *Twin Hills Gasoline Co.* v. *Bradford*, 264 Fed. 440. It is logical that the lessor in the usual oil and gas lease is not entitled to a yearly gas well rental from an oil well producing casing head gas from which gasoline is refined. *Locke* v. *Russell*, 75 W. Va. 602, 84 S. E. 948; *Twin Hills Gasoline Co.* v. *Brad-*

ford, supra. Casing head gas is usually used in the manufacture of gasoline, and most of the courts, in the absence of express stipulation in the lease, allow the usual oil royalty. *Wemple* v. *Producers' Oil Co. supra; Gilbreath* v. *States Oil Corp.*, 4 Fed. (2d) 232. But it has been held, in the case of a sale of oil, gas, and mineral rights, obligating the purchaser to deliver one-eighth of all oil produced, that casing head gas was not included. *Wilkins* v. *Nelson*, 155 La. 807, 99 So. 607. It is difficult to see how this case can be reconciled with *Wemple* v. *Producers' Oil Co., supra*, a case from the same jurisdiction.

The Oklahoma courts, however, take a different view, and in the later decisions, seem to class casing head gas as "gas." *Wolf* v. *Blackwell Oil & Gas Co.*, 77 Okl. 81, 186 Pac. 484; *Paulter* v. *Franchot*, 108 Okl. 130, 235 Pac. 209. It is difficult to tell from some of the cases whether the courts look upon it as either, within the terms of the usual oil and gas leases. *Hammett* v. *Gypsy Oil Co.*, 95 Okl. 234, 218 Pac. 501, 34 A. L. R. 275.

In the instant case the Court of Appeals seems to reach its decision from a construction of the terms of the lease, but it seems clear that casing head gas is regarded as gas, and not as oil. It must be noted that the defendant did not attempt to manufacture gasoline from the gas, but merely used it for pumping purposes, presumably in its gaseous state. It was conceded by both parties that there were no gas wells within the meaning of the lease. It is difficult to tell what the court's decision would have been had the case turned upon this point.

W. C. S.

MUNICIPAL CORPORATIONS—CONSTITUTIONAL LIMITATION ON MUNICIPAL INDEBTEDNESS CANNOT BE AVOIDED BY INSTALLMENT PAYMENTS.—Bill by taxpayers to restrain city from entering into contract to lease additional electrical power machinery for stipulated monthly rentals to be evidenced by city warrants due and payable as the rent became due, with option to purchase the equipment at the end of the term at the price of $1.00. Such contract was made in order to evade the effect of the State Constitution, Section 157, limiting municipal indebtedness. Held: that such obligations would constitute a present indebtedness within the meaning of Section 157 of the Constitution and in an amount forbidden by that section and that such provision could not be avoided by providing for installment payments running through a series of years. *Jones v. Rutherford et al.*, (Ky.), 10 (2nd) S. W. 296.

Section 157 of the Kentucky Constitution provides, in effect that "No city, town, or other municipality . . . shall be permitted to become indebted . . . to an amount exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters thereof . . . and any indebtedness contracted in violation of this section shall be void. . . ."

The above quoted provision or similar ones have been embodied, either in constitutions or statutes, in many states, notably Kentucky, Louisiana, Missouri, Oklahoma, Utah and Wyoming. Such a restric-

tion is also contained in the constitutions of California and Idaho, in which states there is no other fixed debt limit. McQuillin, Municipal Corporations, (2nd Ed.) Vol. 6, Section 2365. It would seem that the primary purpose of such provisions is to compel municipalities to adopt the safe, sane and conservative plan of "pay as you go," and that each year's income and revenue must pay each year's indebtedness and liabilities and also that no indebtedness and liability incurred in any one year shall be paid out of the income and revenue of any future year.

The case of *Bradford* v. *Fiscal Court of Bracken County*, 159 Ky. 544, 167 S. W. 937, presents a good interpretation of that section of the Kentucky Constitution referred to. There the court held that it was not contemplated by the Constitution that a county, even for the purpose of building a courthouse, shall, without a vote of the people, create in one year, a debt to be paid in subsequent years, and for the payment of which no provision can be made out of the income and revenue provided for the year in which the indebtedness is created. Again, in the case of *Flanders* v. *Board of Trustees of Little Rock Graded School*, 170 Ky. 627, 186 S. W. 506, it was held that the creation of a debt by a municipality, without the assent of two-thirds of the voters, was void as in violation of Section 157 of the Constitution, if the entire amount of the debt is greater than the income and revenue for such year and even though the amount is divided into installments payable in a series of years. Other cases holding that a debt created without the assent of voters, by a city, and payable annually through a period of years, was in violation of this section if the total amount of it was more than the income for the year in which it was contracted, although the amount maturing each year could be paid by the income of that year, are, *City* v. *McKenna*, 99 Ky. 508, 36 S. W. 518; *Beard* v. *City*, 95 Ky. 239, 24 S. W. 872; *Knupper* v. *City*, 109 Ky. 187, 58 S. W. 498; *Ramsey* v. *City of Shelbyville*, 119 Ky. 180, 83 S. W. 116.

The test by which to determine whether or not the indebtedness exceeds the limit is the full amount that can be raised by a levy. *City of Providence* v. *The Providence Electric Light Co.*, 122 Ky. 237, 91 S. W. 664.

A directly contrary interpretation has been adopted by the California court. That state, while having a similar restriction in its Constitution, has held that contracts which provide for future annual payments are not obnoxious to the provision, if the payment for the current year is within the income and revenue for that year. *Higgins* v. *San Diego Water Co.*, 118 Cal. 524, 45 Pac. 824; *McBean* v. *Fresno*, 112 Cal. 159, 44 Pac. 358, 31 L. R. A. 794.

With regard to debts incurred by operation of law, or other than by the voluntary act of the municipality, it has been held, in states having similar restrictions, that such debts are included in the prohibition and are therefore void. *Bernard & Co.* v. *Knox County*, 105 Mo. 382, 16 S. W. 917, 13 L. R. A. 244; *Fritch* v. *Salt Lake County*, 15 Utah 83, 93, 47 Pac. 1026; *Grand Island & N. W. Ry. Co.* v. *Baker*, 6 Wyo. 369, 45 Pac. 494, 34 L. R. A. 835.

The obvious purpose of the provision is to force municipalities to adopt the "pay as you go" plan and with this purpose and constitutional intent foremost, the Kentucky court has uniformly prevented any attempts of evasion by installment payments. The Kentucky interpretation is also in accord with the general rule of interpretation followed by states having similar provisions. C. E. B.

PRISONS—IF PRISONER'S INCARCERATION WAS LAWFUL AND JAILER FAILED TO USE MEANS TO PREVENT ASSAULT ON HIM BY ORGANIZATION OF PRISONERS, JAILER AND SURETIES WERE LIABLE.—Plaintiff while incarcerated in a county jail was beaten, bruised, and relieved of his money and other possessions under the decree of a "kangaroo court." He alleged that it was the custom of the inmates of the jail to initiate newcomers by an assault and taking of personal effects; that defendant, as jailer, knew of this custom and by his silence permitted and even encouraged the commission of such acts. This action is to hold the jailer's sureties responsible in damages. Held: If incarceration was lawful and jailer failed to use means at his command to prevent the assault upon the prisoner, by organization of the inmates of the jail, sureties are liable (Ky. St. Secs. 2226, 2229). *Ratliff* v. *Stanley*, 224 Ky. 819, 7 (2nd) S. W. 230.

This case is striking for its novelty, as it brings for the first time, the operations of a "kangaroo court" to the attention of the court of last resort in Kentucky. The Kentucky court, however, has repeatedly held that acts committed by officers, not in the line of their official duties, impose no liability on sureties. *Commonwealth* v. *Hurt*, 23 Ky. Law Rep. 1171, 64 S. W. 911; *Jewel* v. *Mills*, 3 Bush 64; *Murrill* v. *Smith*, 3 Dana 463; *Jones* v. *Van Bever*, 164 Ky. 80, 174 S. W. 795.

The plaintiff, in this case, seeks to fasten liability on the sureties under Sections 2226, 2229, Kentucky Statutes, which provide among other things that a jailer shall receive and keep all persons lawfully committed unto him and shall treat them with humanity. The adjudicated cases dealing with the acts of "kangaroo courts" are very few; but the Oklahoma court, *Hixon* v. *Cupp*, 5 Okl. 545, 49 P. 927, in holding the jailer's surety liable for the acts of a "kangaroo court" which he knew to exist said, "If the jailer is aware of such contemplated assault and does not use every reasonable means at his command to prevent it" he breaches his duty to "faithfully perform" and thereby binds his surety.

In *Riggs* v. *German*, 81 Wash. 128, 142 P. 479, the surety was relieved from liability but solely on the ground that the jailer had no reason to anticipate any maltreatment of the prisoner by the inmates, while the same jurisdiction in *Eberhart* v. *Murphy*, 110 Wash. 168, 188 P. 17, agrees with the Oklahoma court in holding the surety liable for acts done by inmates of the jail if the jailer might under the circumstances anticipate and prevent such action.

The above cases seem to indicate a clear and logical inclination of the courts to regard the existence of such "court" at least with the knowledge and tacit consent of the jailer as a misfeasance in office for which the surety is liable. J. C. B.

RAILROADS—NOISES CREATED IN RAILROAD YARDS, SUCH AS SWITCHING OF CARS, BLOWING OFF OF STEAM, AND RINGING OF BELLS RESULTING IN DISTURBING OF NEARBY RESIDENTS HELD NOT TO CONSTITUTE A COMMON NUISANCE WHERE IT WAS NOT SHOWN THAT NOISES WERE UNNECESSARY.—The prosecuting witnesses resided near the defendant's passenger and freight depot and switching yards. Their testimony tended to show that between the hours of 10 to 11 p. m. and 1 to 3 a. m. the defendant by the operations in its yards and at its station, such as switching of cars, blowing off of steam, ringing of bells and other noises such as shouting of men, created such great noises that the said witnesses' rest was greatly disturbed, and they were otherwise greatly annoyed. The practice had only recently been employed for the alleged purpose of speeding up the delivery of freight to consignees in Frankfort. The prosecuting witnesses did not prove that such noises were not necessary but only that if such operations were continued the noises would result. The motive for suing out the indictment was to require the defendants to either have the switching done during the day or at other places, as formerly. The defendant contended that the old method caused unnecessary delay which could only be remedied by the present practice. Held: That the defendant company would not be liable unless it were shown that the noises complained of were unreasonable and unnecessary or could be avoided. *Louisville & Nashville Ry. Co.* v. *Commonwealth*, 225 Ky. 841, 10 (2d) S. W. 461.

The theory of the case is that the noises complained of to be actionable must constitute a nuisance, and that such noises could not constitute a nuisance unless caused by unreasonable and unnecessary use of force and machinery. That this is based upon the nature of the business, since a railroad is a necessary element of commerce and the public well being, and therefore such noises as are only incident to the reasonable and necessary use are supported by the same reasons which uphold the right of eminent domain.

The Kentucky rule on this point, which seems to be well settled, is that in order to uphold the right to prosecute there must be shown reckless, careless or negligent management which results in unreasonable and unnecessary noises. *Kilcoyn* v. *C., St. L. & N. Ry.*, 141 Ky. 237, 132 S. W. 438; *L. & N. Ry. Co.* v. *Commonwealth*, 158 Ky. 773, 166 S. W. 237.

The rule also seems to prevail in a majority of the states. *Randall* v. *Pacific Ry. Co.*, 65 Mo. 325; *Lehaff & Beidman* v. *Atlantic City Ry. Co.*, 19 Atl. (N. J.) 731. However, in the case of *Colgate* v. *N. Y. Ry. Co.*, 100 N. Y. Sup. 650, a different rule was upheld, though the facts were very similar. The court there held that such noises in residential dis-

tricts, unless for the sole purpose of warning, are nuisances, and that the fact that the railroad was a public utility did not relieve it. The court also suggested that the railroad either rearrange its schedule or carry on such operations in a more sparsely settled locality.

The court in the case at bar seems of the opinion that the company had a right in the street and therefore could operate its trains either during the day or night, that the only restriction was upon the exercise of reasonable care proportional to such use as it wished to make, and not upon the extent of the use. In the case of *Baltimore & Potomac Ry. Co.* v. *Fifth Baptist Church*, 108 U. S. 330, 27 L. Ed. 745, the court considered at great length the various rules and adopted a rule materially different from that of the case at bar. The court held that where the legislature grants privileges and powers to such bodies it does not give therewith the right to exercise such without regard for the private rights of others with immunity, and further, that there are many acts done in pursuance of lawful occupations which because of their peculiar odors and noises are nuisances when carried on in the heart of a city; and that it is a wise police regulation to restrict such operations for the furtherance of health and comfort of its inhabitants; and still further that such operations can be carried on outside the city. W. H. C.

VENDOR AND PURCHASER—PURCHASER COULD NOT RECOVER FROM MINING COMPANY DAMAGES FOR POLLUTION OF CREEK RESULTING FROM CONDITIONS EXISTING WHEN FARM WAS PURCHASED, WHERE CONDITIONS WERE OR MIGHT HAVE BEEN KNOWN.—At the time the plaintiff purchased the farm there were substances from the mines of the defendant flowing in the creek which ran through the farm. These substances consisted of copperas and other deleterious matter which was destructive of crops, timber and soil and contaminated the water to the extent that it was unfit for live stock. Held, the plaintiff could not recover damages for this pollution of the stream because by the use of ordinary care he could have known of the condition at the time he purchased the farm. *Norton Coal Mining Co.* v. *Wilkie et al.*, 224 Ky. 192, 5 (2nd) S. W. 1058.

This decision is based upon the theory that since the trespass or injury to the land existed at the time the grantee purchased, he received a reduction in price equal to the amount of damages the grantor recovered from the defendants or could have recovered; therefore he should not be allowed to recover himself, especially when the injury to the land is so apparent that anyone who would exercise ordinary prudence could detect it.

The Kentucky rule is stated as follows, "If the placing of an obstruction in a stream causes immediate injury, the cause of action then accrues and is in the then owner of the land. . . . In other words, the cause of action is always in the person who owns the land when the injury actually occurs." *Lexington and Eastern Railway Co. et al.* v. *Crain*, 182 Ky. 695, 207 S. W. 447. One who purchased lands after the construction of a permanent railroad embankment cannot recover

for injuries to his crops due to flooding because it is presumed that he received a reduction in the purchase price equal to the damage caused to the land, which damage was paid to the vendor by the trespasser. *Payne* v. *Smith*, 249 S. W. 995, 198 Ky. 564. Also see *Fordson Coal Co.* v. *Pleasnick*, 215 Ky. 794, 287 S. W. 11; *Jones* v. *Whitaker*, 141 Ky. 484, 133 S. W. 223.

This rule is also well settled in other jurisdictions. A conveyance of land does not transfer the grantor's right of action for damages for a trespass theretofore accruing. *La Salle County Carbon Coal Co.* v. *Sanitary District of Chicago*, 260 Ill. 423, 103 N. E. 175. The right to recover damages for the diminished value of the land resulting from a permanent flooding, does not pass by warranty deed to a subsequent owner of the land. *Irvine* v. *City of Oelwein*, 170 Ia. 653, 150 N. W. 674. This rule is upheld in *Smith* v. *Central of Ga. Ry. Co.*, 22 Ga. App. 572, 86 S. E. 570. Missouri has modified the doctrine to the extent that the vendee can recover if the trespass has greatly increased since the conveyance. *Fansler* v. *City of Sedalia*, 189 Mo. App. 454, 176 S. W. 1102. New Jersey holds contra to this rule. *Ratkewicz* v. *Kara*, 88 N. J. Eq. 201, 102 Atl. 634.

While there are various modifications and some contra holdings this rule appears to be sound and followed by the majority of the courts.

G. C. R.